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No. 3460.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

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Harry Dean, *Plaintiff in Error,*	
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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error was proceeded against in the District Court of the Southern District of California, Southern Division, under an indictment purporting to charge him with a violation of the Harrison Narcotic Law, as amended. The indictment is in one count, and defendant below, plaintiff in error herein, was found guilty by a jury and thereafter sentenced by the Honorable Judge Benjamin F. Bledsoe, judge of the said District Court, to imprisonment at McNeil's Island, state of Washington, for a period of four (4) years, from which judgment he prosecutes this writ of error. This Honorable Court is requested to notice as a common error, the specification of error herein.

SPECIFICATIONS OF ERROR.

Plaintiff in error relies upon but one specification of error in the prosecution of his writ, to-wit:

The court erred in rendering judgment in this cause against the plaintiff in error for the reason that the indictment in said cause does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, whatsoever or at all.

ARGUMENT.

The Said Indictment Does Not State Facts Sufficient to Constitute a Public Offense, or Any Offense or Crime Whatsoever Against the Laws or Statutes of the United States in That It Fails to Charge This Defendant With a Violation of the Harrison Narcotic Law as Amended, of Which He Was Found Guilty and Adjudged to Suffer Imprisonment.

It is necessary that a good indictment under this section charge a defendant with failing to pay the special tax required by said law, or said indictment must charge the defendant with dispensing drugs from receptacles containing the said drugs, which receptacles do not then and there bear and have affixed thereon appropriate tax-paid stamps, as required by the Harrison Narcotic Act.

This Honorable Court is familiar with the Harrison Narcotic Act as amended by the Act of February 24, 1919, and it is unnecessary to go further than to state

that the gist of the offense of violating the said act is the purchasing, selling, dispensing, distributing, etc., of drugs from packages or cartons which have not affixed thereon appropriate tax-paid stamps.

The indictment in said cause is as follows:

"INDICTMENT.

Viol. Act Feb. 24, 1919, Amending Act of Dec. 17, 1914, Harrison Narcotic Act.

At a stated term of said court, begun and holden at the city of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and nineteen;

The grand jurors of the United States of America, duly chosen, selected and sworn, within and for the division and district aforesaid, on their oath present:

That Harry Day, alias Harry Dean, alias Franklin P. Blair, whose full and true name other than as herein stated is to the grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit, on or about the 17th day of October, in the year of our Lord one thousand nine hundred and nineteen, at the city of Pasadena, county of Los Angeles, and within the state and Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute morphine and cocaine in and from six paper bags, ten small cardboard boxes, one small celluloid box and one small metal box, which said bags and boxes, and either and each of them, were not then and there the original stamped packages containing the said morphine and said cocaine; and the said morphine was then and there a compound,

manufacture, salt, derivative and preparation of opium, and the said cocaine was then and there a compound, (4) manufacture, salt, derivative and preparation of cocoa leaves; and the said morphine and said cocaine were not then and there obtained from a registered dealer in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under the said act; and the said six paper bags, ten small cardboard boxes, one small celluloid box and one small metal box containing the said morphine and said cocaine did not then and there bear the name and registry number of a druggest, serial number of a prescription, name and address of a patient, and name and registry number of the person in writing the said prescription; that the said morphine and cocaine were not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and a record kept of the said dispensation, administration and giving away of the said morphine and cocaine, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

ROBERT O'CONNOR,
United States Attorney.
GORDON LAWSON,
Assistant United States Attorney.

(Endorsed): No. 1847 Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Harry Day, etc. Indictment—Viol. Act Feb. 24, 1919, amending Act Dec. 17, 1914. Harrison Narcotic Act. A

true bill. John McPeak, foreman. Filed Nov. 21, 1919. Chas. N. Williams, clerk. By Maury Curtis, deputy clerk. Bail, $1,000.00. J. Robt. O'Connor."

The language germane hereto is as follows:
"did knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute morphine and cocaine in six paper bags, ten small cardboard boxes, one small celluloid box, and one metal box, which said bags and boxes, and either and each of them, were not then and there the *original stamped packages* containing said morphine and said cocaine." (Italics are ours.)

It is true that the indictment charges that the package containing the said drug was not then and there the *original stamped package*, and it might be stated in this connection that this is the only language in the indictment which could be remotely urged as supplying the averment that the said receptacle purporting to contain the said drug, did not then and there have affixed thereto appropriate tax-paid stamps, but this averment is meaningless, and cannot supply the omission complained of. The term "original stamped package" can surely not be held by an ordinary person to be synonymous with a failure to pay the special tax required, nor could it be construed to denote the absence of tax-paid or revenue stamps upon the receptacle purporting to contain the drug. It might mean many things. We think it might be reasonably inferred to refer to the label or brand of the package, or the date of the purchase, stamped upon the said receptacle, or something along that line. It clearly fails to apprise the accused of the crime charged, to-

wit: That he failed to pay the special tax, as required, or to have tax-paid or revenue stamps affixed by the internal revenue commissioner to the said package.

Nor can such inference that the term "original stamped package" was intended to denote an absence of tax stamps from the carton or package, be indulged in. Direct averments are required in every indictment, and only those inferences can be drawn which the law itself draws. Inferences cannot be indulged in to make good an indictment lacking in averment, nor is the defect herein under consideration one which can be cured by the evidence or verdict. It is essential to every valid indictment that every fact necessary to charge a crime should be made the subject of direct averment and not left to inference.

We realize that section 1025 of the Revised Statutes provides that:

> "No indictment found and presented by a grand jury in any District or Circuit, or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

However, it is contended that the error herein complained of is not a mere matter of imperfection in form, or a defect in form, but that it tends to substantially prejudice the substantial rights of the defendant which are guaranteed to him, and under which he is entitled to be fully apprised of the exact charge

against him. A crime must be charged with due exactness.

In the case of *Knauer v. United States,* reported in 237 Federal Reporter at page 8, reading from page 12, a proposition of law relative to indictments is therein laid down, which proposition of law has been repeatedly reiterated and followed by the courts, and which is as follows:

> "Does the indictment contain a sufficient accusation of crime, and do its averments furnish the accused with such a description of the charge against them, as will enable them to make their defense and avail themselves of their conviction or acquittal for protection against future proceedings for the same offense?" (Citing authorities, parentheses are ours.)

The principle is not that the evidence subsequently taken may show his guilt, but that there was no proper procedure before the court to justify the taking of that evidence.

In conclusion, it is respectfully urged that the said indictment does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or a violation of any law or statute of the United States of America, in the particular heretofore urged, and that the judgment be reversed.

Respectfully submitted,

WARREN L. WILLIAMS,

SEYMOUR S. SILVERTON,

Attorneys for Plaintiff in Error.

No. 3460.

IN THE

United States

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FOR THE NINTH CIRCUIT.

Harry Dean,

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vs.

The United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

The only point raised is stated by plaintiff in error on page four of his brief, as follows:

"The said indictment does not state facts sufficient to constitute a public offense, or any offense or crime whatsoever against the laws or statutes of the United States, in that it fails to charge this defendant with a violation of the Harrison Narcotic Law as amended, of which he was found guilty and adjudged to suffer imprisonment."

The indictment in this case charges an offense under the Harrison Narcotic Act, as amended February 24th, 1919, and particularly section one thereof, 40 Statutes

at Large, chapter 18, page 1057, at page 1131, which provides:

> "It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of the violation of this section by the person in whose possession same may be found."

The argument of plaintiff in error is to the effect that the indictment, Transcript of Record, pages 5 and 6, by following the statutory language, and particularly that part of it describing the containers of narcotics, "the original stamped packages," was not a sufficient averment, and that the substantial rights of the plaintiff in error were prejudiced in that he was not fully apprised of the nature of the charge preferred against him.

The defendant in error cannot help but feel that the argument of plaintiff in error in respect to the meaning of the statutory language "original stamped packages," especially when construed by the context of the indictment, is somewhat captious, and defendant in error is content to rest the argument on a comparison of the statute itself and a reading of the indictment. [Transcript of Record, pages 5 and 6.]

Respectfully submitted,

ROBERT O'CONNOR,
United States Attorney,

GORDON LAWSON,
Assistant United States Attorney.